

STATE OF MICHIGAN
COURT OF APPEALS

GERALD R. DEHAVEN,

Plaintiff-Appellant,

v

STEPHANIE MARIE VEENSTRA, f/k/a
STEPHANIE MARIE DEHAVEN,

Defendant-Appellee.

UNPUBLISHED

July 1, 2008

No. 281579

Kent Circuit Court

LC No. 00-006732-DM

Before: Bandstra, P.J, and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision to grant defendant's motion to change primary physical custody of the parties' son to defendant. We reverse and remand for reinstatement of the original order granting plaintiff primary physical custody.

Plaintiff and defendant were divorced on March 12, 2001. Plaintiff was awarded sole physical custody of the parties' then four-year old son, in large part because of defendant's issues with alcohol, and perhaps, illegal drugs. In February 2007, defendant, having achieved sobriety and having remarried, moved for a change of custody, on the basis of purported concerns about the child's education and his safety in plaintiff's home arising from the possibility of domestic violence between plaintiff and his long-term girlfriend. However, evidence presented before the trial court established that plaintiff was actively engaged in the child's education and working with the child's teachers to address the child's learning disabilities, that the child was being serviced at school according to an individual education program to provide for his special needs and was making progress under that plan, and that plaintiff was attending to the child's assessment and treatment needs for his learning disabilities, in cooperation with the school and the child's primary care physician. Further, while plaintiff and his girlfriend argued verbally on occasion, there was no evidence of any physical violence between them, or otherwise in plaintiff's home.

A custody award may be modified only upon a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interest. MCL

722.27(1)(c)¹; *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). As this Court explained in *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003):

The plain and ordinary language used in MCL 722.27(1)(c) . . . evinces the Legislature’s intent to condition a trial court’s reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.* [Quotation omitted; emphasis added.]

The movant bears the burden of showing by a preponderance of the evidence that proper cause or a change of circumstances exists. *Id.* at 509. This procedural hurdle to changing custody is in place in order to “erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.” *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995). To constitute proper cause, a movant must establish “one or more appropriate grounds that have or could have a significant effect on the child’s life to the extent that a reevaluation of the child’s custodial situation should be undertaken.” *Vodvarka, supra* at 511.

This Court has explained that, while there is “no hard or fast rule” as to what constitutes proper cause, “trial courts can look for guidance in the twelve [best interests of the child] factors.” However, “not just *any* fact relevant to the twelve factors will constitute sufficient cause. Rather, the grounds presented must be ‘legally sufficient,’ i.e., they must be of a magnitude to have a significant effect on the child’s well-being to the extent that revisiting the custody order would be proper.” *Id.* at 511-512. Similarly, to establish a change of circumstances, the

movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child’s well-being, have materially changed. Again, not just any change will suffice, . . . the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513.]

Whether the facts asserted by the movant are legally sufficient to establish proper cause or a change of circumstance is a question of law. This Court reviews questions of law de novo.

¹ MCL 722.27(1)(c) provides that the circuit court may, “for the best interests of the child,” “modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances.”

Bennett v Weitz, 220 Mich App 295, 299; 559 NW2d 354 (1996); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).

The trial court committed clear legal error by failing to make the threshold determination whether there existed proper cause or a material change of circumstances before analyzing the best interest factors to determine whether to change the child's primary physical custody from plaintiff to defendant. Further, the record does not support a finding that defendant established proper cause or a change of circumstances by a preponderance of the evidence so as to permit the trial court to reconsider the child's custody.

In support of her request for a change in custody, defendant asserted concerns about the child's education and safety. However, as noted above, the record before the trial court established that plaintiff was involved in, and attending to, the child's special educational needs, that the child was making progress with the aid of an individual education plan, and that plaintiff was participating and cooperating with that plan. Defendant's allegations that plaintiff asked the school to refrain from giving her information, that plaintiff and his girlfriend did the child's homework for him, and that the child's teachers were intimidated by plaintiff were shown to be unfounded. Rather, school personnel expressed concern with defendant's tendencies to "baby" the child, and to speak to him in "baby talk." Likewise, defendant's assertions that there was domestic violence in plaintiff's home were also unfounded. There was no evidence that the child witnessed or was subjected to any physical violence while with plaintiff.

Defendant may well have addressed her own behavioral issues that led to primary physical custody being awarded to plaintiff more than seven years ago. However, the fact that defendant is no longer abusing alcohol or other substances is irrelevant to a determination whether placement of the child with plaintiff has become inappropriate. The record is clear that the now ten-year old child has been residing with plaintiff since he was two (and with plaintiff's long-term girlfriend for over four years), that the child is being adequately provided for and cared for in plaintiff's home, and that his special education needs are being met. Defendant failed to establish any material and significant proper cause or change of circumstances warranting reevaluation of the child's custody. Therefore, the trial court was not authorized to reconsider the best interest factors to change the child's primary physical custody and defendant's motion should have been denied. *Vodvarka, supra*.

We reverse and remand for reinstatement of the original order granting plaintiff primary physical custody. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette